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No. 795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MOLLIE S. TAYLOR, MARY J. WAGNER, INEZ L. BOSTIC, JUANITA DONALDSON, GRACE KARNES, PHILLIP E. McBEE, FLOYD HALL, MINTA JUSTICE, OTIS KINNEY, DAVID W. HALL, DICIE P. NEWELL, VICTORIA BRANHAM, MARY B. GALBREATH, DELLA M. GLEASON, BEULAH KULI, MARIE H. HOLBROOK, ALBERT T. RUCKER, BETTY E. HALL, HAROLD JAMES COMER, FRANCIS C. BURNARD, AND NATIONAL LABOR RELATIONS BOARD,

Petitioners,

vs.

FRED H. JOHNSON, TRUSTEE UNDER THE WILL OF CLAY M. THOMAS, DECEASED, D/B/A ATLAS LINEN AND INDUSTRIAL SUPPLY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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The decision herein is in conflict with every case set forth in this table of authorties.

IN THE UNITED STATES SUPREME COURT

MOLLIE S. TAYLOR, MARY J. WAGNER, INEZ L. BOSTIC, JUANITA DONALDSON, GRACE KARNES, PHILLIP E. McBEE, FLOYD HALL, HALL, DICIE P. NEWELL, VICTORIA BRANHAM, MARY B. GALBREATH, DELLA M. GLEASON, BEULAH KULL, MARIE H. HOLBROOK, ALBERT T. RUCKER, BETTY E. HALL, HAROLD JAMES COMER, FRANCIS C. BURNARD, AND NATIONAL LABOR RELATIONS BOARD,

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Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on September 4, 1963.

CITATIONS TO OPINION BELOW

The Opinion of the Court below is unreported and is set forth in Appendix B hereto, *infra*. The petitioners were given leave to intervene by order of the Sixth Circuit Court of Appeals; Appendix D, *infra*, under the authority of *International Union of Mine, Mill and Smelter Workers*

Local 13 v. Eagle Picher Mining and Smelting Co., 325 U.S. 335, 338, 89 L.E. 1649, 65 S. Ct. 1166.

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals for the Sixth Circuit err in denying employees the benefits of an order of reinstatement and back pay on the Board's finding of discriminatory discharge by a decision that the employer was denied a fair hearing solely because there was no specific factual allegation of discriminatory discharge in the complaint even though there were general allegations in the complaint of unlawful discrimination under Section 8(a)(3) of the Act and discriminatory discharge was proven by admissions of the employer and other uncontradicted evidence to which the employer raised no objection which, although at a variance with the specific factual allegations of the complaint fell within the general allegation of unlawful discrimination?

2. If, in fact, a complaint is defective for failure to allege discriminatory discharge, but the parties litigate the issues the employer not raising objection to evidence of discriminatory discharge, the employer's admissions supporting the finding of discriminatory discharge, the employer not claiming surprise at the hearing or asking for a continuance, and the employer's sole objection at the hearing being to questions relating to issues other than discriminatory discharge, under the doctrine of *NLRB v. Mackay Radio*, 304 U.S. 33, has the employer been denied a fair hearing, and, if not, did the Court of Appeals err in

overruling so much of the Board's decision as found discriminatory discharge and awarded reinstatement and back pay?

STATUTES INVOLVED

The statutory provisions involved are the provisions of the National Labor Relations Act, as amended, 29 U.S.C., Sections 151 et seq. and specifically Sections 7, 8(a)(1) and (3), and Section 10 of said Act. Said Sections are set forth in Appendix C, *infra*.

STATEMENT OF THE CASE

Pursuant to the National Labor Relations Act, 29 U.S.C. Section 151 et seq., the individual petitioners herein filed charges and the general counsel issued a complaint based thereon against Fred H. Johnson, d/b a Atlas Linen and Industrial Supply, Columbus, Ohio, alleging that the Atlas Linen Company had unlawfully discriminated against certain individual employees in violation of Sections 8(a)(3) and (1) of the Act. The complaint specifically set forth facts of refusal to reinstate and reemploy striking employees.

The jurisdiction of the Board in this matter is not contested.

The Board found that the respondent employer, Atlas Linen Company, violated Sections 8(a)(3) and (1) of the Act by discriminatorily discharging certain of its employees, who were engaged in a protected economic strike of the employer's two plants in Columbus, Ohio. The Board also found certain conduct on the employer's part to constitute coercion and interference in violation of Section 8 (a)(1) of the Act; said latter matters are not involved here.

The Board filed a petition for enforcement of its order in the Sixth Circuit Court of Appeals.

Initially, the Board had found by its decision, 130 NLRB 761, that the respondent employer had refused to reinstate said individual employees in violation of the Act and filed a petition for enforcement of said order. Then, on its own motion, the Board withdrew the petition, reexamined its aforesaid Decision and Order and the record, and adopted the findings of fact and conclusions of law of the Trial Examiner in reaching their decision involved herein.

The Decision and Order on which the Board sought enforcement stated in part:

> "From the above summary of evidence adduced at the hearing, it is *clear* that the *discharges of these employees were placed in issue and thoroughly litigated by the parties.* In these circumstances, it was proper for the Trial Examiner to consider the issue. We also think, and for the reasons given in the Intermediate Report, that the *Trial Examiner correctly found that the respondent discharged the* charging parties as of April 10, 1959, *because they engaged in*, or (in the case of Della Gleason) were thought to have engaged in *the strike*, and the respondent thereby violated Section 8(a) (3) and (1) of the Act. Accordingly, we now vacate the Board's prior finding, and adopt the Trial Examiner's finding and conclusion in this repect."
>
> "... *the charging parties having been unlawfully discharged* as of April 10, 1959, were entitled to reinstatement upon their unconditional application at the end of the strike even if their jobs had been filled during the strike. The *respondent's refusal to reinstate or reemploy them* at that time and thereafter *was violative* of Section 8(a) (3) and (1) of the Act."
>
> (Emphasis added.)

The Sixth Circuit Court of Appeals determined that "an important question of administrative procedure is presented by this petition." The Court stated:

> "... in this connection the complaint as we read it alleges an economic strike and failure to reinstate the

charging parties. The theory is clear. There is no reference to discriminatory discharge concerning the failure to reinstate or as a violation in itself. Discriminatory discharges is a violation of Section 8(a)(3) and failure to reinstate on request following a discriminatory discharge is yet another violation, but the establishment of the latter finds inevitable focus upon the discriminatory discharge. . . ."

The Court went on to say:

". . . notwithstanding these possible references to the discharge issue (at the hearing), upon considering the record of the whole, we cannot avoid the conclusion the discriminatory discharge was an issue unrecognized by the respondent and not one that should have been readily perceived from the progress of the proceedings." (Parenthetical matter added.)

Therefore, the Court reversed so much of the decision and order of the Board as found discriminatory discharge and ordered reinstatement and back pay for the individual employees concerned.

STATEMENT OF FACTS

The twenty employees involved herein were engaged in various types of laundry work at the Atlas Linen Company. Their pay was One Dollar ($1.00) an hour and their average yearly income was between Two Thousand and Two Thousand Five Hundred Dollars.

Many of these employees had been with the Company for a considerable period of time. For instance, Mollie Taylor had been an employee eight years (R. 105a) (the R. indicates the Record and is denominated Appendix to Petitioners' Brief). Victoria Branham worked for the Company for approximately twelve years (R. 48a); Mary Galbreath was an employee of the Company for approximately nineteen years (R. 158a). Mary Wagner was an employee since

1950 and Grace Karnes was an employee since 1953 (R. 172a and 164a).

A substantial number of employees signed authorization cards with District 50 of the United Mine Workers and said labor organization attempted to obtain recognition from the Atlas Linen Company. No progress having been made, on April 9, 1959, it was determined by the Union to go out on strike the following day, April 10, 1959.

The employer, Atlas Linen Company, was aware that the employees intended to strike on the following day. Charles Allen, a Company foreman (R. 220a), according to the testimony of Inez Bostic, told employees:

> "He told us that if those didn't report for work tomorrow morning, that would have been on Friday, didn't need to come back at all. (R. 76a and 77a)
>
> "Q. Now after the strike was over, did you make any attempts to get your job back?
> "A. Well —
> "Q. Did he say anything else?
> "A. Well, he says, 'I told you the day before you went out on the strike that those who didn't report for work didn't need to come back.'" (R. 77a and 78a)

According to the testimony of B. Hall, Mr. Allen made an announcement to the employees on the floor on April 9, 1959. (R. 113a) She testified that:

> "He said, 'Leroy said that everybody that doesn't show up for work tomorrow is fired.'" (R. 114a).

Mary Galbreath testified at the hearing that she heard Production Manager Houck instruct foreman Yerian to take down the names of the employees who went to the Union meeting in the parking lot across the street (R. 159a). At that same time she heard Houck tell Yerian that if the employees didn't report for work on the next day, they no longer had jobs. (R. 159a).

Warren C. Armstrong, an attorney and the top management representative at the Company (R. 60a), testified that he advised his supervisory personnel:

> "... 'on the basis that people didn't show up for work, they were to be considered discharged.'" (R. 122a)

He further testified that the Company had an existing Company rule that anyone who did not show up for work and did not call in to report off was discharged. (R. 122a) However, Howard E. Smith, a Plant Foreman (R. 208a) contradicted the testimony of Mr. Armstrong as to the applicability of the Company rule. Mr. Smith testified that he had authority to effect a discharge himself and that the practice was not to discharge for a violation of the Company rule of being absent or not calling in.

As Smith testified: (R. 210a)

> "... if a girl didn't call me, I am liable to discharge her if the circumstances—there is a lot of things to take into consideration on that. Maybe the girl was flat on her back and couldn't get to a telephone, maybe she doesn't have a telephone, something like that.
>
> "Q. Have you ever failed to discharge someone who is absent without calling in?
>
> "The Witness: Well, I don't recall any instances like that, but as I said, there is a lot of cases if a girl can't get to the phone, I talk it out with them."

The aforesaid quotations which appear in a number of places throughout the hearing were admitted into evidence *without any objection having been raised on the part of the employer. In addition*, there are *other places in the record* where the testimony is that employees were advised that if they went out on strike they would be automatically out of a job. (R. 28a), (R. 95a), (R. 131a), (R. 82a), (R. 141a), (R. 159a), (R. 114a).

The Company marked the personnel cards of the employees as follows:

"Date separated 4 10 59; Reason Voluntary Quit—Failed to Report to Work." (R. 282a, 283a)

At the Board hearing, Mr. Castrop, the Company executive responsible for the personnel cards testified on re-direct that the cards were really marked as above for unemployment compensation purposes. (R. 188a)

And nowhere in the record does the Company object to the evidence relating to discharge. In fact, the Board found discriminatory discharge primarily on the basis of the evidence offered by the Company.

The strike was ended on April 14 and all the petitioners herein made application on such date to return to their jobs. Recognition of their right to the jobs was refused by the employer. Because of this refusal the petitioners in their individual capacities filed charges with the Regional Office of the N. L. R. B.

The complaint issued thereon charged among other things that:

"6. From on or about April 9, 1959, to April 14, 1959, the employees of Respondent Employer named in Schedule B, attached hereto and made a part hereof engaged in an economic strike."

"8. (1) On or about April 14, 1959, and at all times thereafter the Respondent refused to reinstate and or reemploy said striking employees *because of their activities described in paragraph 6* above and because of their membership in, sympathy for, and concerted activity in behalf of District 50 and/or the teamsters.

"9. *By the acts and conduct* alleged above, the *Respondent has* engaged in and is engaging in *unfair labor practices* as defined in Section 8(a) (1) and (3) of the Act. . . ." (Emphasis added.)

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Is Directly in Conflict with the Decision of the United States Supreme Court in N.L.R.B. v. Mackay Radio and Telegraph Company.

In *N.L.R.B. v. Mackay Radio and Telegraph Co.*, 304 U.S. 333, the respondent employer claimed that it had been summoned to answer a complaint that it discriminated in discharging five men and that after all the evidence was in the complaint was withdrawn and a new one presented asserting that it refused to reemploy these five men; however, when the Board came to decide the case it reverted to its initial position that what the respondent had done was not a failure to reemploy but a wrongful discharge. Thus there was clearly presented a claim by the employer that it did not have a fair hearing before the Board and that it was found guilty of an unfair labor practice which was not within the issues upon which the case was tried.

The Court in *Mackay Radio, supra*, stated:

> "The position is highly technical. All parties to the proceeding knew from the outset that the thing complained of was discrimination against certain men by reason of their alleged Union activities.
>
> * * * * *
>
> "* * * a review of the record shows that at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint. * * *"

Similarly, in the instant case it is plain that the Atlas Linen Company *knew* that it was litigating the question of discriminatory discharge of its employees. The statement of facts set forth herein shows the many instances that *testimony was adduced* at the hearing, *without objection* by the employer, concerning the employer's pre-strike threats to discharge all employees who might strike and also the employer's post-strike statements that all the strikers lost

their jobs when they did not report for work on April 10, together with the employer's attempted subterfuge on the employment cards.

If the employer in actuality did not understand from this hearing that the issue of discriminatory discharge was involved, the question must be asked, why then did the employer attempt to introduce evidence that the notations on the employment card were for purposes of unemployment compensation? (R. 223a, and 226a to 230a) As Mr. Castrop, a Company executive (R. 188a) testified on redirect examination by the Company attorney:

> "... Our stand would be that they voluntarily quit. We came to that decision because of our knowledge that these employees were filing unemployment claims, and that would be our position on the unemployment claims."

Plainly, by the above testimony, the employer was seeking to rebut the evidence of discriminatory discharge.

Thus, the words of the United States Supreme Court in *Mackay Radio, supra*, are equally applicable here

> "... we find from the record that the employer understood the issue and was afforded full opportunity to justify the motion of its officers as innocent rather than discriminatory." (Parenthetical matter added.) (Footnote omitted.)

Clearly, the employer did not object to the testimony as to the discriminatory discharge during the hearing. Section 10 (e) of the Act provides that no objection that was not urged before the Board shall be considered by the Court. The Court, however, found that there was objection and that the trial examiner overruled the objections assuring the respondent that evidence was being admitted for background purposes only. It can be unequivocally stated that none of the objections raised by the respondent em-

ployer went to the admission of evidence of discriminatory discharge. In regard to the one place in the record where the Trial Examiner made the statement about admitting evidence for background purposes, the decision of the Court takes his statement completely out of context. The Board, in commenting on the respondent's exceptions to the Trial Examiner's intervening report (R. 325a, footnote 4) stated:

> . . . we note first that the Trial Examiner in making this statement (about the background material) was passing upon an *alternative ground* of an objection by the respondent to certain questions of the General Counsel concerning statements made by a misidentified person. *Neither the objection nor the statement of the Trial Examiner were directed to other than documentary evidence establishing the discriminatory discharge.* We are satisfied moreover that the *allegations of the complaint did encompass the issue of unlawful discharge* and that the *parties did*, in any event, *substantiate* the matter. (Parenthetical matter added.) (The Trial Examiner's comment may be found in the record at page 139a.) (Emphasis added.)

On the basis of the statements as set forth on that page it cannot be seen how either the respondent employer or the court could find that the employer had been misled in this matter.

2. The Decision of the Court of Appeals Below Is in Conflict with the Decisions of a Substantial Number of Other Circuit Courts of Appeals.

Even the Sixth Circuit Court of Appeals has previously decided that the NLRB complaint need not set out the specific facts constituting the unfair labor practices as finally found by the Board. In *NLRB v. Virginia Manufacturing Product Company*, 109 F. 2d 352 (Sixth Circuit 1940) the Sixth Circuit had said:

> "The complaint did not set out the evidentiary facts constituting the unfair labor practices as finally found

but this was not necessary as all parties to the proceedings knew its basis.

Clearly, the rebuttal attempt by the respondent employer and the employer's failure to object to evidence of discriminatory discharge as it was admitted and the number of times such evidence came into the record clearly show that all the parties to the proceedings knew its basis. In another Sixth Circuit case, *NLRB v. Grieder Machine Tool and Die*, 142 F.2d 163 (Sixth Circuit 1944) the employer contended that there was a variance between the complaint and the evidence and the Court said:

> "The examiner had broad authority to take evidence and make findings unfettered by the strict rules of judicial inquiry. . . ."

The Seventh Circuit was faced with a similar problem in *American Newspaper Pub. Association v. NLRB*, 193 F.2d 782, (Seventh Circuit 1951, *cert. den.* 344 U. S. 812 (1952)). In that case the complaint alleged coercion of employees under Section 8(a) (1) (A). The Board however found a violation of Section 8 (b) (3) and did not find a violation as alleged. Therefore the Board dismissed without considering the sufficiency of the proof and the reviewing Court held this to be error. The Court said:

> "Where, as here, a complaint clearly describes an action which is alleged to constitute an unfair labor practice but fails to allege which subsection of the Act has been violated or alleges the wrong subsection, such failure or mistake, if it does not mislead the parties charged, does not prevent the Board from considering and deciding the charge so presented."

In the Atlas Union Case, with which we deal there is no evidence that the respondent employer was misled and it is clear that the complaint alleges an 8(a) (3) violation and that the Board found an 8(a) (3) violation.

In *General Drivers and Helpers Union, Local 662 v. NLRB*, 302 F.2d 908 (D. C. Cir. 1962) a respondent employer contended that it was denied due process

> "... by the Board's action in finding unfair labor practices based on matters which were not presented or litigated at the hearing, and by predicating its order thereon."

The Court in the *General Drivers* case *supra* indicated that certain facts found were *within the general scope of the complaint* and that "*the Board was not obliged to plead its evidence*." Similarly, in the instant case the discriminatory discharge, unfair labor practice which the Board found is within the scope of the allegation in the complaint that there was an 8 (a) (3) violation by the respondent employer. It was not necessary for the Board to plead its evidence.

It is apparent the paragraph 8 (e) of the complaint informed the respondent that it was charged with unlawful discrimination in connection with the strike activity. This is a violation which the Board found.

In a very similar situation, *NLRB v. Puerto Rico Rayon Mills*, 293 F.2d 941, (1st Cir. 1961) the Company contended that since the charges and the amended complaint do not make any allegation that there was a discharge of employees other than one particular employee, the finding of such discharge and the ordering that the condition be corrected was illegal and must be denied enforcement. As previously in *Puerto Rico Rayon, supra*, the discharge of the other employees was presented by the General Counsel at the hearing as a further act of the Company in regard to the Union buttons. The Court stated:

> "... the Company does not allege or show that it was prejudiced in presenting a defense on this point. The board or the hearing examiner could have amended the complaint to include such charge ..."

It is equally clear here that the Board could have under the provisions of Section 10(c) of the Act amended the complaint to state specifically the matter of discriminatory discharge. While the Board did not amend, the parties here did litigate the issue of discriminatory discharge; the employer did not object to the reception of such evidence; nor did the respondent employer make any motion before the Board for either a continuance or to reopen the record so that additional evidence might be taken. It is plain from the record that the evidence in support of the discriminatory discharge finding comes from the Company representative's admissions and from the Company records.

In regard to the specificity of the complaint, the second Circuit in *NLRB v. Yale and Towne Mfg. Co.*, 114 F.2d 376 (Second Circuit 1940) pointed out that there was no request by the respondent employer for a bill of particulars or for an adjournment and that the respondent employer put in evidence to controvert the Board's evidence with respect to the violations not specifically alleged in the complaint. The Court pointed out that there did not seem to have been any surprise or lack of opportunity for the employer to make its defense and that therefore it was not apparent that the respondent was prejudiced by the lack of particularity in the complaint. In that case the evidence as to other matters was offered by the Board to show "historical background"; this evidence was later used as the basis for findings of unfair labor practices not specifically alleged in the complaint.

CONCLUSION

It is apparent from the decision in *Mackay Radio, supra*, the decisions cited in the other Circuit Courts of Appeal and in the Sixth Circuit, that the courts do not apply technical procedural requirements to the complaint issued by the General Counsel of the National Labor Relations Board. From a standpoint of the efficient and sound administration of justice, it is important that this Honorable Court eliminate the conflict of decisions as between the Circuits. Further, the settlement of this question by this Court is clearly in the public interest, since the complaint is involved in every unfair labor practice case which reaches the Board and only this Court is in a position to resolve this question.

The complaint, of course, is involved in many administrative proceedings and as Professor Davis has stated in his *Treatise on Administrative Law*, section 8.04, page 523,

> "The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue."

To the extent that this atavistic decision returns to the common law technical pleadings, it will slow down the administrative process, and will depart from the process established by Congress of minimizing technical pleading requirements in administration proceedings and of permitting amendment of a complaint (as under section 10 (c) of the Act) so as to provide for ease and efficiency in the administrative hearing procedure. Indeed, it is a well settled and fundamental principle of non-technical pleading and, if changed, it should be changed by the Congress and not the Courts. For these reasons it is respectfully prayed that the Petition for a Writ of Certiorari be granted.

APPENDIX A

NO. 15,031

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FRED H. JOHNSON, TRUSTEE UNDER THE WILL OF CLAY M. THOMAS, DECEASED, D/B/A ATLAS LINEN AND INDUSTRIAL SUPPLY,
Respondent.

ORDER

Before: WEICK, Circuit Judge, BOYD and THORNTON, District Judges.

On petition to enforce an order of the National Labor Relations Board.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that that portion of the Board's order requiring cessation of coercive activity and the posting of notices relating to these violations be enforced. Enforcement of that part of the Board order requiring the respondent to offer reinstatement to the charging parties and to make said parties whole is denied.

Approved for entry:

/s/ MARIAN S. BOYD,
United States District Judge
(Sitting by Designation)

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FRED H. JOHNSON, TRUSTEE UNDER THE WILL OF CLAY M. THOMAS, DECEASED, D/B/A ATLAS LINEN AND INDUSTRIAL SUPPLY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[Decided September 4, 1963]

Before: WEICK, Circuit Judge, BOYD and THORNTON, District Judges.

BOYD, District Judge. Pursuant to Section 10(e), National Labor Relations Act, 29 U.S.C., Section 160 (e), the National Labor Relations Board has petitioned this court for enforcement of its order against the respondent, a cleaning and linen supply establishment, which furnishes its services to industries in the Columbus, Ohio, area and which is owned by a testamentary trust. The jurisdiction of the Board in this matter is not a subject of contest. The Board found that respondent violated Sections 8(a) (3) and (1) of the Act by discriminatorily discharging certain of its employees, who were engaging at the time of the alleged discharge in a protected economic strike of re-

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*9-CA-1925; 130 NLRB 761, 134 NLRB 1236, 136 NLRB 922.

spondent's two plants in Columbus. It also found that certain conduct on part of respondent's management representatives constituted coercion and interference in violation of Section 8(a) (1) of the Act.[1]

Commencing in February, 1959, respondent's production and maintenance employees were the object of an organizational campaign waged by District 50, United Mine Workers of America. One Pacifico, Field Representative of District 50, apprised the production and maintenance employees that because of District 50's failure to comply with the affidavit filing requirements of the now-repealed Section 9(f), (g) and (h) of the Act, the Union could not petition the Board for a representation election and that consequently a strike for recognition was foreseeable. No opposition to such a course was apparent among the employees. Letters to and meetings with management representatives of respondent failed to result in recognition progress satisfactory to District 50. On April 9, 1959, a mass meeting of the production and maintenance employees was addressed by Pacifico, he informing them that it was time to reveal the Union's strength. A strike was called for the following morning. Approximately two hundred fifty of respondent's three hundred production and maintenance employees reported for picket duty. That afternoon the number of pickets was limited by court order from the Franklin County Court of Common Pleas. It suffices for our purposes to here observe that the strike failed and the striking employees requested reinstatement on April 15. Those denied reinstatement on this occasion made additional efforts toward reinstatement. Those who were successful in this regard were told at the time of reinstatement that they were being taken back as new employees, having lost their seniority and vacation benefits. The nineteen charging parties herein were never reinstated.

1. 73 Stat. 525.

The complaint issued by the Board charged the respondent with violation of Sections 8 a) (1) and (3) of the Act in that the respondent refused to reinstate or reemploy the charging parties upon termination of the strike and following their requests for reinstatement. The complaint also charged 8(a) (1) violations, to which there will be brief reference later.

An important question of administrative procedure is presented by this petition. Although there is no mention of discriminatory discharge in the complaint issued by the Board against this respondent, the Trial Examiner found these charging parties to have been discriminatorily discharged in violation of Section 8(a) (3) of the Act. An exception to the Trial Examiner's finding on this point was taken by the respondent. In its initial decision and order the Board found this exception to be well taken. It said:

> Respondent excepts to the Trial Examiner's finding that charging parties were discriminatorily discharged on the first day of the strike. We find merit in this exception. We note that the complaint herein did not allege discriminatory discharges; rather the complaint alleged that the charging parties engaged in an economic strike and that respondent violated 8(a) (3) by failing to reinstate them. Moreover, the issue as to whether they were discharged was not fully litigated at the hearing. Accordingly we do not adopt the Trial Examiner's finding in this report. However, we do find in agreement with the Trial Examiner and as alleged in the complaint that the respondent violated Section 8(a) (3) of the Act by failing to reemploy the charging parties.[2]

As indicated in the quoted excerpt, the Board did adopt the Trial Examiner's finding that there was an unlawful failure to reemploy the within charging parties. This

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2. 130 N.L.R.B. 781 at 762.

strike was an economic strike, as distinguished from an unfair labor practices strike. Economic strikers are entitled to reinstatement following an economic strike unless the employer has replaced the strikers. *National Labor Relations Board v. Mackay Company*, 304 U.S. 333. The Board concluded in its first decision and order that there was nothing in the record before it to indicate replacement of the charging parties prior to their requests for reinstatement. The respondent was ordered to cease and desist from the unfair practices found and, affirmatively, to offer reinstatement to the charging parties with back pay. A petition for enforcement of its order was filed by the Board in this court. Leave to voluntarily withdraw its petition without prejudice was then sought by and granted to the Board by order of the court. The Board subsequently entered its Supplemental Decision and Order,[8] which is featured by a complete reversal of its original position. Upon reconsideration of the case the Board found insufficient evidence of unlawful failure to reinstate economic strikers, but found sufficient evidence of discriminatory discharge of the within charging parties on the first day of the strike. The Board's original order was thus, for the most part, kept intact. Upon its reconsideration the Board found that the allegations in the complaint were broad enough to include discriminatory discharge and that, at any rate, the discriminatory discharge aspect was fully litigated at the hearing before the Examiner. From our examination of the complaint, the applicable law and the record as a whole, we cannot agree that the language of the complaint reasonably gave notice of the issue of discriminatory discharge, nor can we agree that the matter of discriminatory discharge was fully litigated.

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8. 134 N.L.R.B. 1239.

The office of the complaint issued by the Board is to "notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing." *Douds v. International Longshoremen's Association*, 241 F.2d 278 (C. A. 2) 1957. The Administrative Procedure Act, 5 U.S.C., Section 1004(a), requires that "(p)ersons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted." In *Labor Board v. H. E. Fletcher Company*, 298 F.2d 594 (C. A. 1) 1962, there was no mention of the found violation in the complaint. After concluding that the issue there involved had also not been litigated at the hearing, the court observed at page 600 that "it would derogate elemental concepts of due process to grant enforcement to such a finding." No little juggling of theory is necessary in order to now place the issue of discriminatory discharge in the within complaint so as to have put the respondent on notice thereof. In this connection the complaint as we read it alleges an economic strike and failure to reinstate the charging parties. The theory is clear. There is no reference to discriminatory discharge concerning the failure to reinstate or as a violation in itself. Discriminatory discharge is a violation of Section 8(a) (3) and failure to reinstate on request following a discriminatory discharge is yet another violation, but the establishment of the latter finds inevitable focus upon the discriminatory discharge. We would avoid the obvious were we to overlook the omission of any reference to discriminatory discharge in the complaint, which, when the allegations that are present are considered, tends to point away from contemplation of any theory of discriminatory discharge. It must be borne in mind that we are here dealing with a question of fundamental fairness. Reasonableness is the

touchstone. While the Board is certainly free in protection of the public interest entrusted to it to change its collective mind, it appears rather indicative that clear doubt as to notice of this issue must have existed upon rendition of its initial Decision and Order. Was respondent apprised or should it reasonably have been apprised by the complaint of the issues it was obligated to meet? The answer must be in the negative. The particularity of pleading in and indictment, declaration at law, or bill in equity is not required of a complaint issued by the Board. *Consumers Power Co. v. Labor Board*, 113 F.2d 38 (C.A. 6) 1940. However the principal function of the complaint is notice and it did not serve that purpose here.

Was the issue of discriminatory discharge fully litigated? If so, the respondent cannot be heard to complain of lack of opportunity to meet the charges against it even though the complaint be found lacking; for a complaint may be amended to conform to proof adduced on the hearing. *Labor Board v. Puerto Rico Ragon Mills*, 293 F.2d 941 (C. A. 1) 1961. At several points in the course of the hearing counsel for respondent objected to evidence or testimony bearing on matters not alleged in the complaint. The Trial Examiner overruled the objections but assured the respondent that the evidence was being admitted for background purposes only; that if there was no corresponding allegation in the complaint the evidence admitted would not be considered as the basis for a finding of unfair labor practice. The evidence upon which the Board placed greatest emphasis concerning discriminatory discharges was the notation upon the employment cards of the strikers to the effect that they had voluntarily quit on the first day of the strike. It is to be noted that one of respondent's management representatives testified that these notations were made for

unemployment compensation purposes. Notwithstanding these possible references to the discharge issue, upon considering the record as a whole, we cannot avoid the conclusion the discriminatory discharge was an issue unrecognized by the respondent and not one that should have been readily perceived from the progress of the proceedings. We cannot find from this record as did the Supreme Court from the record before it in *Labor Board v. Mackay Company, supra*, that there was no misunderstanding as to the basis of the Board's complaint. The Court observed in that case:

> "'While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory.'"[1]

The misgivings entertained by the Board as to notice and full hearing upon its initial consideration of the case we find controlling now.

The Board found certain conduct on the part of respondent's representatives to constitute coercion in violation of Section 8(a) (1) of the Act. We detect no prejudicial error in this findings and consider them to be supported by substantial evidence. *Universal Camera Corp. v. Labor Board*, 340 U.S. 474.

To that portion of the Board's order requiring cessation of such coercive activity and the posting of notices relating to these violations we grant enforcement. Enforcement of that part of the order requiring the respondent to offer reinstatement to the charging parties begin and to make said parties whole is denied.

1/ At page 350.

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

* * * * * * * * *

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

SEC. 8: (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * * * * * * * *

(e) The board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts busi

ness, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence in the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record * * * Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

APPENDIX D
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
FRED H. JOHNSON, TRUSTEE UNDER THE WILL OF CLAY M. THOMAS, DECEASED, D B A ATLAS LINEN AND INDUSTRIAL SUPPLY,
Respondent.

ORDER

(Filed November 29, 1963).

Before: WEICK, Chief Judge, CECIL and O'SULLIVAN, Circuit Judges.

This cause came on to be heard on the motion filed by Mollie S. Taylor, Mary J. Wagner, Inez L. Bostic, Juanita Donaldson, Grace Karnes, Phillip E. McBee, Floyd Hall, Minta Justice, Otis Kinney, David W. Hall, Dicie P. Newell, Victoria Brantham, Mary B. Galbreath, Delia M. Gleason, Beulah Kuh, Maxie H. Holbrook, Albert T. Rucker, Betty E. Hall, Harold James Comer and Frances C. Burnard for leave to intervene as petitioners for the purpose of perfecting an appeal to the Supreme Court, and on the memorandums of the respondent and the Board in opposition thereto, on consideration whereof, the Court finds said motion to intervene is well taken and is hereby granted. *International Union of Mine, Mill and Smelter Workers Local 121 v. Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 338.

The motion for leave to intervene filed by Region 34 District 50, United Mine Workers is hereby denied.

PAUL C. WEICK
United States Circuit Judge

APPENDIX E

COMPLAINT ORDER CONSOLIDATING CASES AND NOTICE OF HEARING

Unfair labor practice charges and Amended Charges having been filed by Mollie S. Taylor, Mary J. Wagner, Inez L. Bostic, Juanita Donahlson, Grace Karnes, Phillip E. McBee, Floyd Hall, Minta Justice, Otis Kinney, David W. Hall, Essie P. Newell, Victoria Branham, Mary B. Galbreath, Della M. Gleason, Beulah Kuhl, Marie H. Holbrook, Albert T. Rucker, Betty E. Hall, Harold James Comer and Francis C. Burnard, against Fred H. Johnson, Trustee under the will of Clay M. Thomas, deceased, doing business as Atlas Linen and Industrial Supply, herein called the Respondent, which Charges and Amended Charges have been duly served upon the Respondent, as specifically alleged below, pursuant to Section 10 (b) of the National Labor Relations Act, 61 Stat. 136, herein called the Act and Section 102.15, Series 7, as amended, of the Rules and Regulations of the National Labor Relations Board, herein called the Board, the General Counsel of the Board, by the undersigned Regional Director, issues this Complaint against the Respondent, and Notice of Hearing thereon, and alleges that:

1. The Charges and Amended Charges were served on the Respondent by mailing two copies thereof to him via Registered United States Mail on the dates indicated in Schedule A, attached hereto and made a part hereof.

2. (a) Atlas Linen and Industrial Supply is a business enterprise operated by Fred H. Johnson under a testamentary trust established by the will of Clay M. Thomas, deceased. As such trustee, the Respondent is engaged in Columbus, Ohio, in the business of supplying linen, uniforms and industrial clothing to business enterprises and

individuals in the Columbus area. During the calendar year 1958, a representative period, his gross volume of business exceeded $3,000,000.00 and he purchased in excess of $550,000.00 worth of linen and industrial clothing from suppliers located outside of the State of Ohio.

(b) Now and at all times material to the issues herein, the Respondent is and has been, an Employer as defined in Section 2 (2) of the Act, engaged in "commerce" and or in operations "affecting commerce" as defined in Section 2 (6) and (7) of the Act respectively.

3. Now and at all times material to the issues herein District 50, United Mine Workers of America and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called District 50 and Teamsters, respectively, are and have been, labor organizations as defined in Section 2 (5) of the Act.

4. At all times material to the issues herein, LeRoy Houck, Lester Yerian, Charles Allen and Howard Smith, herein called Houck, Yerian, Allen and Smith, respectively, have been employed by the Respondent as supervisors as defined in Section 2 (11) of the Act.

6. From on or about April 9, 1959 to April 14, 1959, the employees of Respondent Employer, named in Schedule B, attached hereto and made a part hereof, engaged in an economic strike.

7. On or about April 14, 1959, said striking employees requested the Respondent to reinstate them them and on the same date, and continuously thereafter, they also requested the Respondent to reemploy them.

8. (a) On or about April 14, 1959, and at all times thereafter, the Respondent refused to reinstate said striking employees;

(b) On or about April 14, 1959, and at all times thereafter, the Respondent refused to reemploy said striking employees;

(c) On or about April 14, 1959, and at all times thereafter, the Respondent refused to reinstate and or to reemploy said striking employees because of their activities described in paragraph 6 above and because of their membership in, sympathy for and concerted activity on behalf of District 50 and or the Teamsters.

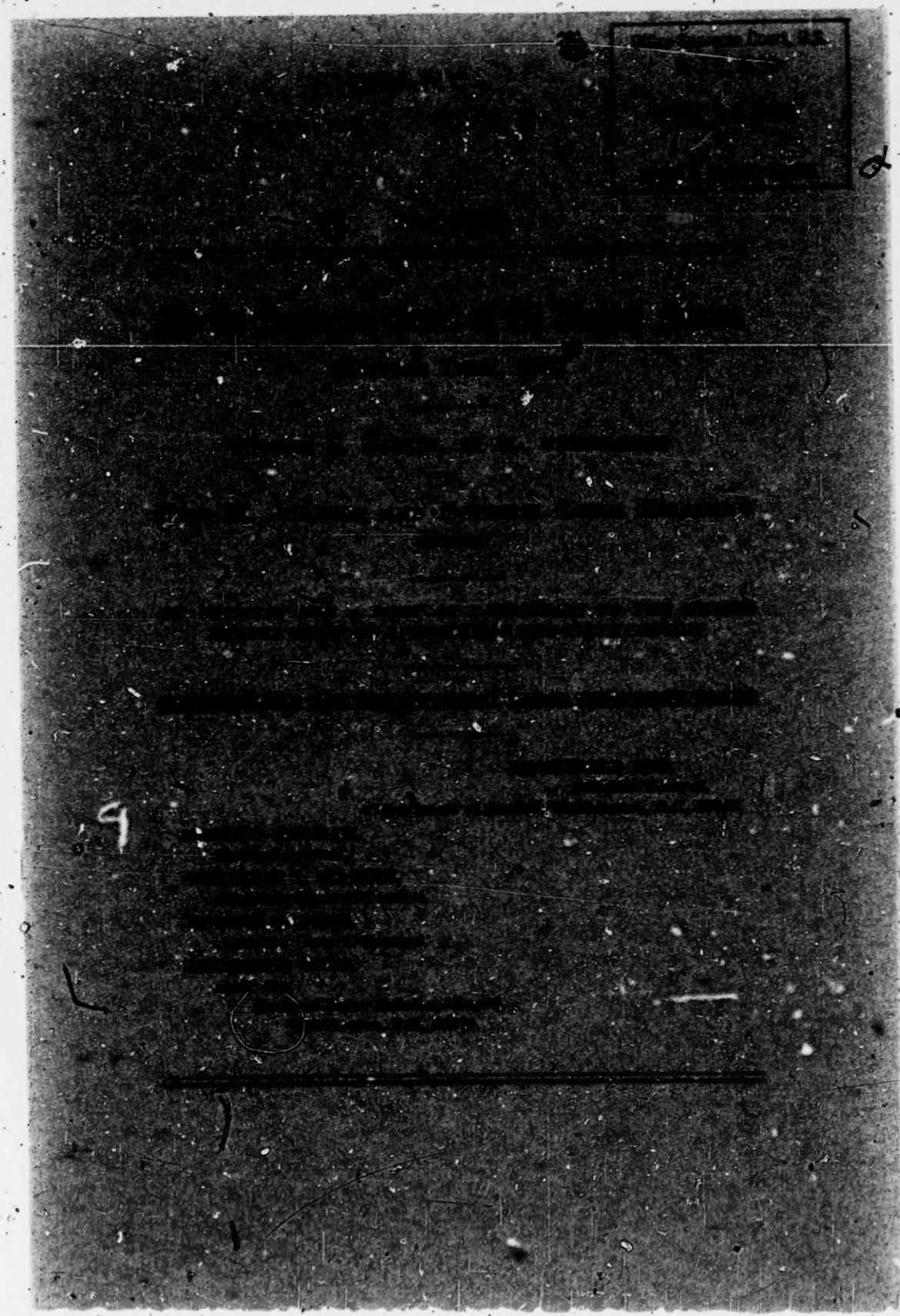
9. By the acts and conduct alleged above, the Respondent has engaged in and is engaging in unfair labor practices as defined in Section 8(a)(1) and (3) of the Act, affecting "commerce" as defined in Section 2 (6) of the Act.

PROOF OF SERVICE

The undersigned hereby certifies that on the ... day of January, 1964, he served copies of the foregoing Petition for Writ of Certiorari on the Attorneys for the Respondent, Fred H. Johnson, trustee, dba Atlas Linen and Industrial Supply by personally serving Robert E. Newlon, Attorney, 8 East Broad St., Columbus, and by mailing a copy by United States Mail, postage prepaid, to Jack G. Evans & Thomas S. Calder, Esq., Dinsmore, Shohl, Dinsmore & Todd, Union Central Life Building Cincinnati 2, Ohio.

The undersigned further certifies that on the same date he served copies of the Petition herein on the National Labor Relations Board by mailing a copy of the Petition herein by U.S. Mail, postage prepaid, to Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Washington, D.C. and to The Solicitor General of the United States, Department of Justice, Washington, D.C.

STEWART R. JAFFE,
Attorney for Petitioner



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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 795

MOLLIE S. TAYLOR, ET AL., PETITIONERS

v.

FRED H. JOHNSON AND NATIONAL LABOR RELATIONS BOARD[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The issue in the case is whether the respondent employer ("Atlas") had sufficient notice that it was being charged in the administrative proceedings before the National Labor Relations Board with discriminatorily discharging (as distinguished from refusing to hire) certain employees. The petitioners, discharged employees who filed charges with the Board against Atlas, were permitted to intervene in the court of appeals (Pet. 27), and thus have standing to file the instant petition. *International Union*

[1] The petition erroneously named the Board as a petitioner rather than as a respondent.

of Misc., Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 338. The petition was timely filed,[1] and the jurisdiction of this Court is properly invoked under 28 U.S.C. 1254(1).

Based upon petitioners' charges, the General Counsel of the Board issued a complaint alleging that, from April 9 to 14, 1959, petitioners engaged in an economic strike against Atlas, and that thereafter Atlas refused to reinstate them because of their strike and union activities, in violation of Section 8(a)(3) of the Act (Pet. 29–30). The Trial Examiner found that Atlas unlawfully discriminated against petitioners by discharging them, on the first day of the strike, because they had gone out on strike, and recommended that they be reinstated with back pay (B.A. 281a–283a, 306a).[2] In its first decision, the Board rejected the finding of discriminatory discharge, on the ground that that issue was not raised in the complaint or fully litigated at the hearing. The Board found however, that there was a discriminatory denial of reemployment, since, when the employees abandoned the strike on April 14, they were denied

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[1] The judgment of the court of appeals was entered on September 4, 1963 (Pet. 1). On November 27, 1963, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including February 1, 1964. The petition was filed on January 29, 1964.

[2] "B.A." refers to the printed appendix to the Board's brief in the court below. One of the petitioners, David Hall, was excluded from the reinstatement and backpay remedy because of his participation in uncondoned strike misconduct (B.A. 300a–301a).

reinstatement although they had not been permanently replaced (B.A. 255a). But on reconsideration the Board, finding that the record showed that the strikers had been replaced by April 11 (B.A. 324a), set aside its earlier ground of decision and adopted the Trial Examiner's finding that the employees had been discriminatorily discharged. The Board explained its reversal of position as follows (B.A. 322a):

> * * * while the better practice might have been to specifically allege discriminatory discharges, we do not think that the allegations that were made necessarily excluded consideration of the issue whether these employees had a right to reinstatement and reemployment arising from the Respondent's discharge of them for engaging in the strike * * *. However, aside from the matter of whether the complaint alleged with sufficient particularity the discharge issue, we are convinced that the parties fully litigated this question and it was [in] issue at the hearing.

The court of appeals rejected the Board's finding that the strikers had been discriminatorily discharged, and denied enforcement of the reinstatement and backpay provisions of its order.[*] The court stated (Pet. 20):

> From our examination of the complaint, the applicable law and the record as a whole, we cannot agree that the language of the com-

[*] The court enforced the portion of the Board's order requiring certain other acts of restraint and coercion, which the Board found were violative of Section 8(a)(1) of the Act (Pet. 23; B.A. 304a-306a).

plaint reasonably gave notice of the issue of discriminatory discharge, nor can we agree that the matter of discriminatory discharge was fully litigated.

The question presented is whether Atlas was sufficiently apprised, by the complaint and during the Board hearing, that it was being charged with having discharged the petitioners because of their strike activities. The answer to this question depends upon the facts and circumstances of this particular case. The Board, based on its analysis of the record, concluded that Atlas had adequate notice of the issue; the court below, however, reached a contrary conclusion.[5] While the Board believes that its evaluation was reasonable, it did not petition for certiorari because it was of the view that the court of appeals' contrary appraisal of the record did not present an issue of sufficient importance to warrant review by

[5] The court distinguished *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349–350, which involved a similar situation. The court stated (Pet. 23):

"Notwithstanding, * * * possible references to the discharge issue, upon considering the record as a whole, we cannot avoid the conclusion the discriminatory discharge was an issue unrecognized by [Atlas] and not one that should have been readily perceived from the progress of the proceedings. We cannot find from this record as did the Supreme Court from the record before it in *Labor Board* v. *Mackay Company*, *supra*, that there was no misunderstanding as to the basis of the Board's complaint."

this Court. Should the Court grant this petition, however the Board would defend its decision.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
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National Labor Relations Board.

FEBRUARY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964

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JOHN F. DAVIS, CLERK

No. 725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MOLLIE S. TAYLOR, MARY J. WAGNER, INEZ L. BOSTIC, JUANITA DONALDSON, GRACE KARNES, PHILLIP E. McBEE, FLOYD HALL, MINTA JUSTICE, OTIS KINNEY, DAVID W. HALL, DICIE P. NEWELL, VICTORIA BRANHAM, MARY B. GALBREATH, DELLA M. GLEASON, BEULAH KULI, MARIE H. HOLBROOK, ALBERT T. RUCKER, BETTY E. HALL, HAROLD JAMES COMER, FRANCIS C. BURNARD,

Petitioners,

v.

FRED H. JOHNSON, TRUSTEE UNDER THE WILL OF CLAY M. THOMAS, DECEASED, D/B/A ATLAS LINEN AND INDUSTRIAL SUPPLY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MOLLIE S. TAYLOR, MARY J. WAGNER, INEZ L. BOSTIC, JUANITA DONALDSON, GRACE KARNES, PHILLIP E. McBEE, FLOYD HALL, MINTA JUSTICE, OTIS KINNEY, DAVID W. HALL, DICIE P. NEWELL, VICTORIA BRANHAM, MARY B. GALBREATH, DELLA M. GLEASON, BEULAH KULL, MARIE H. HOLBROOK, ALBERT T. RUCKER, BETTY E. HALL, HAROLD JAMES COMER, FRANCIS C. BURNARD,

Petitioners,

v.

FRED H. JOHNSON, TRUSTEE UNDER THE WILL OF CLAY M. THOMAS, DECEASED, D B A ATLAS LINEN AND INDUSTRIAL SUPPLY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This petition for certiorari was filed by the charging parties who were allowed to intervene in the proceeding below subsequent to the decision of the Court of Appeals. The National Labor Relations Board (hereafter referred

to as the "Board") did not petition for review. Consequently, petitioners' inclusion of the Board as a named petitioner in the caption is inaccurate and improper.

Petitioners' lack of accuracy also extends to the Statement of Questions Presented and the Statement of the Case. The former assumes facts squarely contrary to the findings of the Court of Appeals and the latter is merely a repetition of factual arguments which the Board made unsuccessfully in the Court below. For these reasons respondent has restated the Questions Presented and the Statement of the Case to reflect the bases for the decision of the Court of Appeals and the issues which are before this Court.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals misapprehend or grossly mis-apply the controlling legal standard in denying enforcement of that part of a Board order which found that respondent violated Section 8(a)(3) of the National Labor Relations Act by discriminatorily discharging the charging parties?

2. Do petitioners who were charging parties in the proceeding before the Board have standing to seek review of a decision of the Court of Appeals which denied in part the Board's petition for enforcement where the Board declined to petition for certiorari and the charging parties did not intervene until subsequent to the decision of the Court of Appeals?

COUNTERSTATEMENT OF THE CASE

The essential facts pertinent to the issues before this Court are summarized in the opinion of the Court of Appeals. Since that Court found that the issue of discriminatory discharge was neither comprehended by the pleadings nor recognizable during the hearing, it was unneces-

sary for that Court to pass upon any of the other issues in the case. Since these other issues are similarly not before this Court we will limit this presentation to the procedural issue which was determinative in the Court of Appeals.

The complaint which was issued by the Regional Director of the Board's Ninth Region charged that certain employees of respondent engaged in an economic strike from April 9, 1959, to April 14, 1959, and that respondent failed to reinstate or reemploy the strikers at the termination of the strike in violation of Section 8(a)(3) of the National Labor Relations Act, as amended (hereafter referred to as "the Act"). A number of separate violations of 8(a)(1) were also alleged. There was no allegation of discriminatory discharge on April 10, 1959, or on any other date. These charges were litigated at a lengthy hearing during the course of which the trial examnier ruled without qualification that nothing would be found to be a violation if it were not alleged in the complaint.

The sequence of proceedings subsequent to the hearing was as follows:

Intermediate Report—Respondent was found to have violated Section 8(a)(3) by refusal to reinstate or reemploy the charging parties at the end of the strike *and by discharging the charging parties at the outset of the strike.* Separate violations of Section 8(a)(1) were also found. Exceptions were taken by respondent.

First Board Order (130 NLRB 761)

1. The finding of discriminatory discharge was not adopted because it was not alleged in the complaint and not litigated at the hearing.

2. The finding of discriminatory refusal to reinstate was adopted and respondent was directed to reinstate the charging parties with back pay. The findings of 8(a)(1) violation were also adopted.

First Petition for Enforcement—Filed by the Board April 19, 1961, and withdrawn without explanation on June 13, 1961.

Second Board Order (134 NLRB 1230 and 136 NLRB 922):

1. The previous finding of discriminatory refusal to reinstate the charging parties was set aside as not being supported by the evidence—but——

2. The previous finding that the trial examiner erred in finding a discriminatory discharge was also set aside and the trial examiner's finding was adopted.

3. Respondent's exceptions pointing out the rulings of the trial examiner that findings of violation would be limited to the allegations of the complaint were overruled and respondent was again directed to reinstate the charging parties with back pay.

On the Board's second petition for enforcement, the Court of Appeals granted enforcement of that part of the Board's Second Order which found violations of Section 8(a)(1) but denied enforcement of the finding of 8(a)(3) violation because respondent was not afforded reasonable notice and an opportunity to defend against the claim of discriminatory discharge.

Following the decision of the Court of Appeals the Board notified respondent of its obligation to post notices pursuant to the findings of 8(a)(1) violation. Respondent agreed to comply with this request if the Board did not intend to seek review of the denial of enforcement of the 8(a)(3) finding. Respondent received the Board's assurance that no further appeal would be taken by the Board and in reliance respondent posted the notices. Thus as far as the Board and the respondent are concerned the proceedings have terminated. The correspondence between respondent and the Board is set out at pages 12-13.

Petitioners did not intervene at any stage of the pro-

ceedings prior to the decision of the Court of Appeals and it was not until the Board made known its intention not to file a petition for certiorari that petitioners appeared on the scene with a motion to intervene in the proceedings below. The motion was allowed over the objections of both respondent and the Board.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Did Not Misapprehend or Misapply the Controlling Legal Standard in Determining that the Issue of Discriminatory Discharge Was Not Alleged in the Complaint or Litigated in the Hearing.

This Court has limited its scope of review of decisions of the Courts of Appeal in cases arising under the Act to:

> "... what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied" *Universal Camera v. N. L. R. B.*, 340 U. S. 474, 490-491 (1951).

This limitation is based on the primary responsibility which the Act gives to the Courts of Appeal for review of decisions of the Board, *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404 (1962), and upon the policy which this Court has stated of non-interference in cases where the decisions of the Courts of Appeal "depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Commission v. American Tobacco Company*, 274 U. S. 543 (1927). Where the decision of the Court of Appeals is based on a conscientious evaluation of the record as a whole, this Court applies the policy of non-intervention regardless of whether this Court would have come to the same conclusion as the Court of Appeals if it were sitting in the place of the Court of Appeals. *NLRB* v. *Pittsburgh S.S. Co.*, 340 U. S. 498 (1951).

Within this framework it is clear that the decision of

the Court of Appeals should be respected. The standards applied by the Court of Appeals were:

> "Was respondent apprised or should it reasonably have been apprised by the complaint of the issues it was obligated to meet?" and,
>
> "Was the issue of discriminatory discharge fully litigated?"

Upon an evaluation of the record as a whole the Court of Appeals answered both questions in the negative.

The plain wording of the complaint discloses that discriminatory discharge was not within its purview. The complaint did not merely allege generalized violation of Section 8(a)(3) but rather the complaint alleged violation by specific acts, i.e., failure to reinstate and reemploy strikers at the end of the strike and thereafter. How this language could apprise respondent of an alleged discriminatory discharge on April 10 is beyond comprehension and we submit that the Court of Appeals understated the variance by the observation that:

> "No little juggling of theory is necessary in order to now place the issue of discriminatory discharge in the within complaint so as to have put respondent on the notice thereof"

Even prior to the Administrative Procedure Act, this Court held that a respondent could not be charged with notice of matters which were not alleged in the Board's complaint. *Consolidated Edison* v. *NLRB*, 305 U. S. 197, 234-235 (1938). The requirement of timely notice was formalized in the Administrative Procedure Act (5 U. S. C. 1004(a)), a statute which was described by the House Judiciary Committee as "... an outline of minimum essential rights and procedures" (H.R. 1980, 79th Cong., 1946 U. S. Code Cong. Service 1205). Hence petitioners' contentions that the complaint should be disregarded really

amount to objections to the wisdom of the Administrative Procedure Act. Finally, we think it is most significant that the Board reached the same decision as the Court of Appeals on the question in its first decision when its order was based on refusal to reinstate rather than discriminatory discharge.

In contending that the issue of discriminatory discharge was fully litigated, petitioners refer this Court to approximately 10 lines of testimony out of a record of 960 pages. The Court of Appeals, on the basis of the *entire record*, concluded that the issue had not been litigated. The Board also reached this conclusion in the first instance. The 10 lines selected by petitioners are surely no basis for concluding that the Court of Appeals grossly misapplied the standard. To comb a record after it is closed and come up with a scrap which might have been relevant to another issue is a far cry from showing that the issue was recognized and that both parties treated it as an issue in the case.

Petitioner stresses that the scraps which have been gleaned from the record were received without objection. There are several answers to petitioners' contentions:

(a) Respondent did object during the proceeding to evidence unrelated to any allegation in the complaint and the objections were overruled—but the trial examiner specifically limited such evidence to proof of background and motive and ruled that no findings of violation would be made beyond the allegations of the complaint. After this ruling it would have been ridiculous for respondent to continue to make the same objection. Respondent was, of course, unaware that the trial examiner would violate his own ruling and commitment.*

* The Board has subsequently ruled that same trial examiner for [illegible] of violation beyond the scope of the complaint, and [illegible] (1962).

(b) Respondent preserved its objection to evidence unrelated to the complaint by timely motions to strike made at the conclusion of the Board's case and at the conclusion of all evidence.

(c) There were a number of allegations of 8(a)(1) violation in the complaint in addition to the alleged refusal to reinstate the charging parties. Evidence which petitioners now seize upon as relating to the discharge issue, e.g., threats of discharge, were assumed to relate to 8(a)(1) allegations if not to background and motive.

Petitioners rely heavily upon *NLRB* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333 (1938). This reliance is misplaced. In *Mackay* the only variance between the complaint and the Board's findings was the terminology employed—*the events which formed the basis for the finding of violation were the same.* In the present case the events differ completely—discharge on April 10, 1959, vis-a-vis failure to reinstate on and after April 14, 1959. The Court of Appeals was not unaware of the *Mackay* case. Rather it found specifically that the case differed from *Mackay* because respondent neither recognized the discharge issue nor was the issue one which should have been perceived. Again, this finding was made upon consideration of the entire record—not mere isolated excerpts taken out of context.

Petitioners' final contention, that the decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeal may be disposed of in short order. It is obvious that cases which reach the Courts of Appeal differ widely in the extent and significance of the variance between the complaint and the Board's findings. These cases also differ in the extent to which the respondent may have waived the variance by litigating the omitted issue. Consequently, in some cases (including those cited by petitioners) the variance has been found to be minor or to have

been fully litigated while in others, like the present, the variance has been found to vitiate the Board's decision.* Two decisions of this Court, *Mackay* and *Consolidated Edison* also consider this issue and arrive at different conclusions but those cases are not in conflict—*the facts were simply different.* Decisions based on factual differences obviously do not create a conflict within the meaning of Rule 19(b).

2. Petitioners Lack Standing to Petition for Certiorari.

Petitioners filed charges in mid-1959, which set in motion the machinery of the National Labor Relations Act. From that point forward the matter was within the sole jurisdiction of the Board. Pursuant to the statutory mandate the Board investigated the charges, issued a complaint and processed the case through hearing, decision, enforcement and compliance proceedings. Now the Board has determined that the purposes of the Act will not be effectuated by prolonging the litigation. Responsibility for the administration of the Act has been delegated to the Board, and just as the Board has sole authority to determine whether to seek enforcement of a Board order, the Board should have sole discretion to seek further review from an adverse decision.

The decision of this Court in *Int'l Union Mine Workers v. Eagle-Picher Co.*, 325 U. S. 335 (1945), does not aid petitioners. There the charging party intervened prior to the decision of the Court of Appeals and intervened again in support of a petition by the Board to vacate the order of the Court of Appeals. Since the charging party had participated in the case at the appellate level this Court held that the interest of the charging party in the decision

* E.g., *NLRB v. H. E. Fletcher Co.*, 298 F. 2d 594 (1 Cir. 1962); *NLRB v. Threads, Inc.*, 308 F. 2d 1 (4 Cir. 1962); *NLRB v. Lilco Mfg. Co.*, 210 F. 2d 631 (5 Cir. 1954); *NLRB v. Brazil Wood Co.*, 182 F. 2d 144 (7 Cir. 1951).

of the Court of Appeals was sufficient to support a petition for certiorari. Here petitioners' intervention was entirely "after the fact," and they have no comparable interest.

It is a basic tenet of the national labor policy that the Act does not create private rights. The Board acts solely as a public agent—"not to give effect to a private administrative remedy." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 269 (1940). However, petitioners do not even purport to seek enforcement of public rights. To the contrary, petitioners have a single objective—reinstatement with back pay—and in their view the Board was derelict in not pursuing their claim to the highest Court. This is the very antithesis of the national labor policy and we submit that petitioners should not be permitted to subvert the Board's role. Since the Board has not sought certiorari and since Respondent has complied with that portion of the Board order which was enforced the petition should be dismissed for lack of standing by petitioners. Alternatively, Respondent submits that since the Board, which has the responsibility for securing enforcement of the Act, has declined to petition for certiorari, the case does not involve any issues which are important to the administration of the Act and the petition should, therefore, be denied.

CONCLUSION

All litigation is important to those who are affected by the outcome but all litigation must also come to an end. The facts which gave rise to the present case are now five years old. Petitioners have had their day in Court and the Board, which has the responsibility of representing the public interest has decided to abide by the decision of the Court of Appeals and to forego further appeal. Respondent has similarly complied with the decision of the Court of Appeals. We submit that there are no special and im-

portant reasons to disturb the disposition of the case and that the petition should, therefore, be denied.

Respectfully submitted,

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Attorney for Respondent,
FRED. H. JOHNSON, Trustee, etc.

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Columbus, Ohio.

APPENDIX A

October 30, 1963

Mr. Emil C. Farkas
Acting Regional Director
1200 Transit Building
6 East 4th St.
Cincinnati 2, Ohio

Re: Fred H. Johnson, Trustee Under the Will of Clay M. Thomas, Deceased, d/b/a Atlas Linen & Industrial Supply, Case No. 9-CA-1925 et al.

Dear Mr. Farkas:

This is in reply to your letter of October 25, 1963 concerning compliance with the remainder of the order of the board which was enforced by the Court of Appeals.

The Company is agreeable to posting the notice providing, however, that you are willing to indicate that no further appeal will be taken.

Very truly yours,

WARREN C. ARMSTRONG,
Personal Representative
Fred H. Johnson, Trustee
Under the Will of Clay M.
Thomas, Deceased

APPENDIX B

[N. L. R. B. SEAL]

NATIONAL LABOR RELATIONS BOARD
NINTH REGION
1200 Transit Building, 6 East Fourth Street
Cincinnati, Ohio 45202 Telephone: 381-1420

November 13, 1963

Mr. Warren C. Armstrong, Attorney
Armstrong, Speer & Millious
1350 West Fifth Avenue, Suite 300
Columbus 12, Ohio

Re: FRED H. JOHNSON, TRUSTEE UNDER THE WILL OF CLAY M. THOMAS, DECEASED, d/b/a ATLAS LINEN & INDUSTRIAL SUPPLY Case No. 9-CA-1925, et al.

Dear Mr. Armstrong:

Your letter dated October 30, 1963, was received in our office on this date. In response to your question, the National Labor Relations Board does not intend to take any further appeal in this matter. Therefore, please post the Notices in accordance with the instructions mailed to you on October 25, 1963.

Very truly yours,

/s ALVIN SCHWARTZ,
ALVIN SCHWARTZ,
Compliance Officer